

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

GREAT AMERICAN INSURANCE
COMPANY OF NEW YORK,

Plaintiff,

v.

NIPPON YUSEN KAISHA, and others,

Defendants.

Case No. 13-cv-00031 NC

**ORDER GRANTING MOTION TO
DISMISS**

Re: Dkt. No. 14

Defendants Nippon Yusen Kaisha and NYK Line North America, Inc. move to dismiss plaintiff Great American Insurance Company of New York's complaint under Federal Rule of Civil Procedure 12(b)(3). NYK alleges that a forum selection clause in the bill of lading that governs the parties' transaction dictates that all claims against NYK must be brought in the Tokyo District Court in Japan. The issues are (1) whether NYK has waived its defense of improper venue, and if not, (2) whether the forum selection clause is enforceable. Because the Court concludes that NYK has not waived its defense and the clause is enforceable, the Court GRANTS the motion to dismiss WITH LEAVE TO AMEND within fourteen days.

I. BACKGROUND

A. Facts Alleged in the Complaint

Great American alleges that NYK contracted to ship 6,000 cartons of grapes from Oakland, California to Manila, Philippines at a temperature of 33.08 degrees Fahrenheit.

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1 Dkt. No. 1 at 6. But, the temperature allegedly varied widely during shipping, which
2 caused the grapes to arrive at their destination moldy and rotting. *Id.* Great American
3 claims the damage to the grapes depreciated their value by \$48,840. *Id.*

4 Great American, an insurance company, indemnified the owner of the grapes \$48,840
5 in accordance with the terms of its insurance policy. *Id.* It now seeks to recover that
6 amount, as well as interest and costs, from NYK. *Id.* at 7.

7 **B. Procedural History**

8 Great American sued NYK for breach of contract in the Superior Court of California
9 for Alameda County. *Id.* at 6. NYK removed the action to this Court on January 3, 2013,
10 asserting federal jurisdiction under the Carriage of Goods by Sea Act, 46 U.S.C. § 30701.
11 *Id.* at 1-2. On January 10, 2013, NYK filed its answer to the complaint. Dkt. No. 4. The
12 answer asserted seventeen affirmative defenses, including that any claims against NYK
13 must be brought in Japan under the terms of the bill of lading. *Id.* ¶ 13.

14 On March 19, 2013, NYK moved to dismiss the action under Rule 12(b)(3) for
15 improper venue due to the forum selection clause contained in the bill of lading. Dkt. No.
16 10. NYK argues that the clause is valid and enforceable, that the Ninth Circuit and courts in
17 this district have enforced similar provisions, and that Great American has failed to show
18 that the clause is unreasonable under the circumstances. *Id.* at 9-15.

19 Great American opposes the motion, arguing that the clause at issue contains
20 uncertainty that undermines the purpose of forum selection clauses and renders it unfair and
21 unenforceable. Dkt. No. 17. Specifically, Great American takes issue with the fact that the
22 clause is in a contract of adhesion and that it imposes unequal burdens on the parties
23 because it states that claims against NYK must be brought in the Tokyo District Court in
24 Japan, while actions against the merchant can be brought in any other fora, at the carrier's
25 option. *Id.* at 2. Great American also argues that NYK has waived its defense of improper
26 venue because it filed an answer before filing a motion under Rule 12(b)(3) and because it
27 removed the action to federal court. *Id.* at 4-5.

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1 **C. Jurisdiction**

2 This Court has subject matter jurisdiction under 28 U.S.C. § 1331 under the Carriage
3 of Goods by Sea Act, 46 U.S.C. § 30701. Dkt. No. 1. All parties have consented to the
4 jurisdiction of a United States magistrate judge under 28 U.S.C. § 636(c). Dkt. Nos. 5, 12.

5 **II. STANDARD OF REVIEW**

6 Forum selection “clauses are prima facie valid and should be enforced unless
7 enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”
8 *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). Unreasonable circumstances
9 that would render a forum selection clause unenforceable include: “(1) if the inclusion of
10 the clause in the agreement was the product of fraud or overreaching; (2) if the party
11 wishing to repudiate the clause would effectively be deprived of his day in court were the
12 clause enforced; and (3) if enforcement would contravene a strong public policy of the
13 forum in which suit is brought.” *Petersen v. Boeing Co.*, No. 11-18075, 2013 WL 1776975,
14 *2 (9th Cir. Apr. 26, 2013) (internal citations and quotation marks omitted).

15 A motion to dismiss a plaintiff’s claim based on a forum selection clause is analyzed
16 under Federal Rule of Civil Procedure 12(b)(3). *Argueta v. Banco Mexicano, S.A.*, 87 F.3d
17 320, 324 (9th Cir. 1996). Under this standard, the pleadings are not accepted as true, and
18 the district court may consider facts outside of the pleadings. *Id.* “[I]n the context of a Rule
19 12(b)(3) motion based upon a forum selection clause, the trial court must draw all
20 reasonable inferences in favor of the non-moving party and resolve all factual conflicts in
21 favor of the non-moving party.” *Murphy v. Schneider Nat’l, Inc.*, 362 F.3d 1133, 1138 (9th
22 Cir. 2003). “Whether to hold a hearing on disputed facts and the scope and method of the
23 hearing is within the sound discretion of the district court.” *Id.* at 1139. In the alternative,
24 the district court may deny a Rule 12(b)(3) motion and grant leave to refile the motion, if
25 further development of the record would eliminate any genuine factual dispute. *Murphy*,
26 362 F.3d at 1139.

27 The Ninth Circuit has shown a preference, however, for trial courts to hold an
28 evidentiary hearing to resolve issues of fact relevant to the enforceability of a forum

selection clause. *See, e.g., Petersen*, 2013 WL 1776975 at *4 (holding that “the district court erred by not—at the very least—conducting an evidentiary hearing to determine whether enforcement of the forum selection clause at issue” was warranted and remanding to the district court to find necessary facts); *Murphy*, 362 F.3d at 1143 (“Absent an evidentiary hearing to resolve the factual contest, the Rule 12(b)(3) motion should have been denied.”). If the court dismisses a complaint under Rule 12(b)(3) due to an enforceable forum selection clause, “leave to amend should be granted with extreme liberality.” *Petersen*, 2013 WL 1776975 at *4.

III. DISCUSSION

A. NYK Did Not Waive Its Rule 12(b)(3) Defense.

1. Filing an answer did not waive NYK’s improper venue defense.

NYK properly pleaded its defense of improper venue due to the forum selection clause in its answer. Dkt. No. 4 ¶ 13. Rule 12(h) expressly permits certain Rule 12(b) defenses—improper venue among them—to be included in a responsive pleading. Fed. R. Civ. P. 12(h)(1)(B) (“A party waives any defense listed in Rule 12(b)(2)-(5) by failing to either make it by motion under this rule; or include it in a responsive pleading.”); *see also* Fed. R. Civ. P. 12(b) (“No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.”).

Where a defendant has properly pleaded and preserved his affirmative defense in his answer under 12(h), he must then “do something to test the defense.” *Ear v. Empire Collection Authorities, Inc.*, No. 12-cv-01695 SC, 2012 WL 3249514, *3 (N.D. Cal. Aug. 7, 2012) (ordering defendant to file motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) after raising the defense in its answer). Notably, Rule 12(g)’s prohibition on seriatim motions does not include defenses raised in responsive pleadings. *See* Fed. R. Civ. P. 12(g) (“a party that makes *a motion* under this rule must not *make another motion* under this rule raising a defense or objection that was available to the party but omitted from its earlier motion”) (emphasis added). Moreover, Rule 12(i) allows a court to hear and decide

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1 before trial any defense brought under Rule 12, whether made in a motion or in a responsive
2 pleading.

3 At the hearing, plaintiff's counsel cited, for the first time, three cases, *Elvig v. Calvin*
4 *Presbyterian Church*, 375 F.3d 951, 954 (9th Cir. 2004), *Aetna Life Ins. Co. v. Alla Med.*
5 *Servs., Inc.*, 855 F.2d 1470, 1474 (9th Cir. 1988), and *Jensen v. Knowles*, 621 F. Supp. 2d
6 921, 925 (E.D. Cal. 2008), which he asserted stand for the proposition that NYK may not
7 make a motion to dismiss under Rule 12(b)(3) after filing an answer. Each of these courts
8 reached their conclusions based on the language of Rule 12(b), which states that "[a] motion
9 asserting any of these defenses must be made before pleading." In *Aetna Life Insurance*,
10 the Ninth Circuit rejected the district court's conclusion that a Rule 12(b) motion must be
11 filed within twenty-one days of service of the complaint under Rule 12(a), and reversed the
12 district court's finding a Rule 12(b)(6) motion untimely where the parties had stipulated to
13 extend the time in which to file a responsive pleading, and the defendant had filed its
14 motion within that timeframe. 855 F.2d at 1474. See also *Bechtel v. Liberty Nat'l Bank*,
15 534 F.2d 1335, 1341 (9th Cir. 1976) (holding same for motion brought under Rule
16 12(b)(3)). In *Jensen*, the Eastern District Court noted that Rule 12(b) "appears to specify
17 the timing requirement only for the seven enumerated defenses." 621 F. Supp. 2d at 925.
18 And in *Elvig*, the Ninth Circuit held that the district court should have treated the motion to
19 dismiss under Rule 12(b)(6) as a motion for judgment on the pleadings under Rule 12(c)
20 because it was filed after the answer. 375 F.3d at 954.

21 At least one court has construed a motion to dismiss for improper venue made after an
22 answer as a motion for judgment on the pleadings under Rule 12(c). See *Hillis v.*
23 *Heineman*, No. 09-73 PHX (DGC), 2009 WL 2781971, *1 (D. Ariz. Aug. 31, 2009)
24 (construing the motion as one for judgment on the pleadings under Rule 12(c) where
25 defendants asserted defense of improper venue in answer). Rule 12(c) requires the court to
26 accept the pleadings as true and not consider other evidence. *Cafasso, U.S. ex rel. v. Gen.*
27 *Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1053 (9th Cir. 2011) ("When considering a Rule
28 12(c) dismissal, we must accept the facts as pled by the nonmovant."). The court may

1 convert a Rule 12(c) motion to a motion for summary judgment and consider evidence
2 outside the pleadings. Fed. R. Civ. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c),
3 matters outside the pleadings are presented to and not excluded by the court, the motion
4 must be treated as one for summary judgment under Rule 56.”). Under Rule 56(c), the
5 court does not weigh evidence or assess credibility; it only determines whether “there is no
6 genuine dispute as to any material fact.” Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby,*
7 *Inc.*, 477 U.S. 242, 255 (1986) (“Credibility determinations, the weighing of the evidence,
8 and the drawing of legitimate inferences from the facts are jury functions, not those of a
9 judge, [when] he is ruling on a motion for summary judgment.”).

10 This standard is fundamentally different than the Rule 12(b)(3) analysis prescribed by
11 the Ninth Circuit. In resolving a motion to dismiss for improper venue under Rule 12(b)(3),
12 the district court must “consider facts outside of the pleadings,” *Argueta*, 87 F.3d at 324,
13 “resolve all factual conflicts in favor of the non-moving party,” and if necessary, “hold[] an
14 evidentiary hearing on the disputed facts,” *Murphy*, 362 F.3d 1138-39. “Upon holding an
15 evidentiary hearing to resolve material disputed facts, the district court may weigh
16 evidence, assess credibility, and make findings of fact that are dispositive on the Rule
17 12(b)(3) motion.” *Murphy*, 362 F.3d at 1140. *Murphy*, in fact, allows a district court to
18 grant a party leave to *refile* a motion to dismiss under Rule 12(b)(3) after further factual
19 development, for example, at the close of pretrial discovery. *Id.* at 1139 (emphasis added).
20 Thus, it seems that even after a responsive pleading has been filed which preserves the
21 defense of improper venue based on a forum selection clause, a motion to dismiss brought
22 on those grounds must be analyzed under Rule 12(b)(3) because of the particular procedures
23 the Ninth Circuit established in *Murphy*.

24 One thing at least is clear: NYK properly preserved its improper venue defense. It
25 now moves to dismiss Great American’s complaint based on its argument that the claims
26 are brought in the improper venue due to an enforceable forum selection clause. Thus, the
27 Court considers NYK’s properly preserved defense in accordance with *Murphy*.

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2. Removing to federal court did not waive NYK's venue defense.

Great American also contends that NYK has waived its defense of improper venue by removing the action to federal court. In *Polizzi v. Cowles Magazines, Inc.*, the Supreme Court stated that “the proper venue of a removed action is ‘the district court of the United States for the district and division embracing the place where such action is pending.’” 345 U.S. 663, 666 (1953) (quoting 28 U.S.C. § 1441(a)). Although there is some variance among courts as to whether removal to federal court waives a challenge to venue, *see, e.g., Black v. JCPenney Life Ins. Co.*, No. 01-cv-04070 SI, 2002 WL 523568, *2 (N.D. Cal. Apr. 1, 2002) (denying defendant’s motion to dismiss under Rule 12(b)(3) and finding that under *Polizzi* venue was proper because the action was removed to the district in which the state action was pending), courts to have considered the issue when a forum selection clause is in play have found that removal does not waive a party’s right to enforce the venue selected by the clause.¹ *See, e.g., IBC Aviation Servs., Inc. v. Compania Mexicana de Aviacion, S.A. de C.V.*, 125 F. Supp. 2d 1008, 1013 (N.D. Cal. 2000).

The Ninth Circuit has not expressly spoken on this issue but has considered motions to dismiss or transfer based on the provisions of a forum selection clause after a case has been removed to federal court. *See Spradlin v. Lear Siegler Mgmt. Svcs. Co., Inc.*, 926 F.2d 865, 868-69 (9th Cir.1991) (granting motion to dismiss for improper venue based on forum selection clause after removal); *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 496-98 (9th Cir. 2000) (affirming denial of motion to transfer under 28 U.S.C. § 1406 to forum contracted for because it contravened public policy). The Second Circuit has stated unequivocally that “[w]hen a defendant removes an action from a state court in which he has been sued, he consents to nothing and ‘waives’ nothing; he is exercising a privilege unconditionally conferred by statute, and, since the district court to which he must remove it is fixed by law, he has no choice, without which there can be no ‘waiver.’” *Greenberg v. Giannini*, 140 F.2d 550, 553 (2d Cir. 1944). The First Circuit reached a similar conclusion:

¹ Whether a procedural rule should turn on the underlying substantive claim or the existence of a private contract is a question for another day.

1 “It is well settled that the filing of a removal petition in a diversity action, without more,
 2 does not waive the right to object in federal court to the state court venue. In order to obtain
 3 the benefits of a federal forum in diversity cases, the removal must be into the district where
 4 such suit is pending; no choice is possible and for that reason nothing in respect to venue
 5 can be waived.” *Lambert v. Kysar*, 983 F.2d 1110, 1113 n.2 (1st Cir. 1993) (internal
 6 citation and quotation marks omitted).

7 Courts in the Northern District have also enforced forum selection clauses after
 8 removal. In *IBC Aviation*, the court found that “where the underlying contract designates a
 9 specific forum,” “timely removal to federal court does not waive a defendant’s right to raise
 10 venue objections.” 125 F. Supp. 2d at 1013. Rather, “federal courts generally uphold the
 11 parties’ designated forum, rather than merely requiring compliance with § 1441.” *Id.* See
 12 also *Soil Shield Int’l, Inc. v. Lilly Indus., Inc.*, No. 98-cv-01353 SC, 1998 WL 283580, *2
 13 (N.D. Cal. May 29, 1998) (finding that defendant make seek dismissal where a forum
 14 selection clause renders venue improper even after removal); accord *Skillnet Solutions, Inc.*
 15 *v. Entm’t Publications, LLC*, No. 11-cv-04865 PSG, 2012 WL 692412, *4 (N.D. Cal. Mar.
 16 2, 2012) *reconsideration denied*, No. 11-cv-04865 PSG, 2012 WL 1670182 (N.D. Cal. May
 17 14, 2012) (“A defendant who properly removes to federal court therefore meets the venue
 18 requirements of § 1441, in effect canceling any improper venue objection under Fed. R.
 19 Civ. P. 12(b)(3). The existence of a valid forum selection clause, however, may create an
 20 exception to this general rule.”) (internal citations omitted).

21 The weight of authority supports NYK’s procedure in this case. The Court finds that
 22 NYK has not waived its defense of improper venue by removing the action to federal court.

23 **B. The Forum Selection Clause Is Enforceable.**

24 Great American argues that the forum selection clause is unenforceable because it is
 25 one-sided, selecting a certain forum for claims brought against NYK and stating that actions
 26 brought against the merchant can be brought in any fora. The applicable provision states:
 27 “Notwithstanding anything else contained in this Bill or in any other contract, any and all
 28 actions against the Carrier in respect of the Goods or arising out of the Carriage shall be

1 brought before the Tokyo District Court in Japan to the exclusion of the jurisdiction of any
2 other courts whilst any such actions against the Merchant may be brought before the said
3 Court or any other competent court at the Carrier's option." Dkt. No. 10-3 at 4-5.

4 Great American relies heavily on *LG Electronics Inc. v. Fritz Transp. Int'l*, No. 00-
5 cv-04507 SI, 2001 WL 1843715 (N.D. Cal. Oct. 2, 2001) for its argument that the forum
6 selection clause is unreasonable. In *LG Electronics*, the forum selection clause selected the
7 United States but contained an exception that the carrier could, at its option, choose one of
8 six other fora in which to actually litigate and did not state when such a choice needed to be
9 made. 2001 WL 1843715 at *1. When the carrier moved to exercise its option after ten
10 months of litigation in the United States, the court reasoned that the "carrier's option" in the
11 bill of lading at issue created "the very 'uncertainty and possibly great inconvenience' that
12 valid choice-of-forum agreements avoid" and was thus unreasonable. *Id.* at *3. The court's
13 analysis of the forum selection clause is dicta, however. The court ultimately denied the
14 motion to dismiss as untimely because the carrier had failed to assert its defense based on
15 the carrier's option in either its answer or its motion to dismiss based on forum non
16 conveniens. *Id.* at *2.

17 The forum selection clause at issue here is different from the one in *LG Electronics*,
18 in that there is no option for the carrier to exercise when it is sued. Although the clause
19 selects only Tokyo District Court for suits brought against NYK, and allows for suit in "any
20 competent court" for suits brought against the merchant, this does not give rise to the same
21 type of uncertainty regarding where suit may be brought or when the option to select a
22 forum may be exercised that the court addressed in *LG Electronics*. Furthermore, "forum
23 selection clauses do not need to provide reciprocal and equal benefits to contracting parties
24 to be enforceable." *Danmar Lines, Ltd. v. CMA CGS S.A.*, No. 09-cv-22857, 2010 WL
25 5174975, *3 (S.D. Fla. June 16, 2010); *see also Am. Home Assurance Co. v. TGL Container*
26 *Lines, Ltd.*, 347 F. Supp. 2d 749, 760 (N.D. Cal. 2004) (enforcing forum selection clause in
27 bill of lading that gave merchant option of four fora); *Union Steel Am. Co. v. M/V Sanko*
28 *Spruce*, 14 F. Supp. 2d 682, 687 (D.N.J. 1998) (enforcing forum selection clause that

1 designated one forum for litigation and allowed the carrier to pursue arbitration at its sole
2 discretion).

3 Great American's argument that different fora for different parties to a bill of lading
4 renders the bill per se unreasonable misunderstands the role of the court in determining the
5 enforceability of a forum selection clause. Rather, what *Bremen* and its progeny make clear
6 is the "case-by-case nature of the inquiry into the reasonableness of enforcing a forum
7 selection clause against a particular plaintiff." *Am. Home Assurance*, 347 F. Supp. 2d at
8 760 (declining to find that there was a number of potential fora that would make a selection
9 clause per se unenforceable). Great American does not state any facts that would enable the
10 Court to conclude that the forum selection clause is unreasonable under the circumstances.
11 It does not claim that the inclusion of the clause in the bill of lading was the product of
12 fraud, or that enforcement of the clause will contravene public policy in California or be so
13 inconvenient that it will deprive Great American of its day in court. Great American has
14 failed to meet its burden to show enforcement is unreasonable.

15 Lastly, the forum selection clause is not unenforceable merely because it is part of a
16 contract of adhesion. The Supreme Court has upheld the enforcement of forum selection
17 clauses contained in nonnegotiated form contracts. *Vimar Seguros y Reaseguros, S.A. v.*
18 *M/V Sky Reefer*, 515 U.S. 528, 530 (1995) (enforcing foreign arbitration clause contained in
19 "a standard form bill of lading"). The Ninth Circuit has also stated that the fact that bills of
20 lading are contracts of adhesion is relevant only where there is ambiguity in the clause, and
21 only insofar as ambiguities will be construed against the drafter. *Fireman's Fund Ins. Co.*
22 *v. M.V. DSR Atl.*, 131 F.3d 1336, 1339 (9th Cir. 1997) ("As we find no ambiguity in the
23 forum clause, whether or not the bill of lading is a contract of adhesion is of no relevance to
24 the result we reach in this matter."). A contract of adhesion does not, as a matter of law,
25 render the forum selection clause therein unenforceable. *Id.*

26 That the bill of lading at issue here is a contract of adhesion and selects a different
27 forum for litigation by NYK than for claims brought against NYK does not make the forum
28 selection clause inherently unenforceable. That the forum selected varies according to

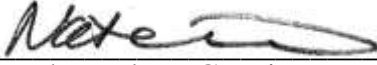
1 whether NYK is the defendant or plaintiff does not create uncertainty that would render
2 enforcing the agreement unreasonable under the circumstances. In the absence of any other
3 evidence that enforcement of the clause would be unreasonable, the Court GRANTS NYK's
4 motion to dismiss. Great American has LEAVE TO AMEND its complaint to allege facts
5 sufficient to carry its "heavy burden of proof and . . . clearly show that enforcement would
6 be unreasonable and unjust." *Murphy*, 362 F.3d at 1140.

7 IV. CONCLUSION

8 NYK has not waived its defense of improper venue, and Great American has not met
9 its burden to show that the forum selection clause is unenforceable. Accordingly, the Court
10 GRANTS NYK's motion to dismiss under Rule 12(b)(3). Great American has LEAVE TO
11 AMEND its complaint to plead additional facts that would tend to show the forum selection
12 clause is unenforceable. Any amendment is due within fourteen days of the date of this
13 order.

14 IT IS SO ORDERED.

15 Date: May 10, 2013

16 
Nathanael M. Cousins
United States Magistrate Judge